STATE OF MICHIGAN
IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS

JOAN M. GLASS,

Plaintiff-Appellant,

v

Supreme Court Docket No. 126409

Court of Appeals No. 242641

Alcona Circuit Ct. No. 01-10713-CK

RICHARD A. GOECKEL and
KATHLEEN D. GOECKEL,

Defendants-Appellees.
_____/

BRIEF OF AMICUS CURIAE

MICHIGAN LAND USE INSTITUTE

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

STATMENT OF QUESTIONS PRESENTED

I. Did the Trial Court correctly rule that Plaintiff, as a member of the public, possesses the right of pedestrian travel along the shores of the Great Lakes pursuant to the Public Trust Doctrine?

Trial Court Answered:	Yes
Plaintiff-Appellant Answers:	Yes
Defendants-Appellees Answer:	No
Amicus Curiae Answers:	Yes

II. Did the Court of Appeals err in reversing the trial court through the fabrication of a new rule of law that breaches the Public Trust by conferring exclusive possession rights to riparian owners to the actual waters' edge?

Plaintiff-Appellant Answers:	Yes
Defendants-Appellees Answer:	No
Amicus Curiae Answers:	Yes

INTEREST OF AMICUS CURIAE

The Michigan Land Use Institute ("Institute") was in founded in 1995 in response to emerging patterns in population growth, economic development, and governmental policies that are detrimental to the natural resources, environment, and overall quality of life in Michigan. The Institute is an independent, non-profit, research, educational, and service organization operating to promote the public interest. The goal of the Institute is to establish and promote an approach to policy-making and economic development that strengthens communities, enhances opportunity and protects the state's unmatched natural resources. The mission of the Institute has always been to help Michigan avoid the patterns of suburban sprawl and over-development that cause traffic congestion, pollution, loss of community, rising costs to individuals and governments, and a deteriorating quality of life. Ultimately, the Institute seeks to build a new kind of economy that celebrates the region's unique character, and recognizes the need to conserve open land and protect clean air and water.

The disputed issues in this action are of great significance to many of the interests that are central to the mission of the Institute. The ancient public trust doctrine preserving the shores of the Great Lakes as lands held by the State in trust for the benefit of the public has always been acknowledged and sedulously protected by this Court. The Institute believes that the erroneous decision of the Court of Appeals in this case is a matter of grave concern because it marks a radical departure from this Court's jurisprudence on the public trust doctrine. To the detriment of the citizenry, the Court of Appeals has seriously compromised the scope and operation of the public trust doctrine in a decision that unnecessarily creates an antagonistic relationship between riparian

owners and the public. The decision summarily cancels what was previously a long-recognized right of the public to simply walk the shores of the Great Lakes and engage in a shared appreciation and enjoyment of the most unique feature and greatest natural resource of this State. If allowed to stand, the Court of Appeals' decision will encourage private riparian owners to usurp, segregate and isolate the shores of the Great Lakes through fencing and other measures that will necessarily infringe on the public trust and destroy the natural beauty of our shores. The Michigan Land Use Institute urges this Court to reverse the decision of the Court of Appeals and issue an opinion restoring the original scope of the public trust and clarifying its limits by adopting a common law definition of the "ordinary high water mark" delimiting public trust lands in a manner that allows for "reasonable" public access for purposes of pedestrian travel along the shores.

ARGUMENT

I. The New Rule Fabricated by the Court of Appeals That Riparian Owners Have Exclusive Possession of Great Lakes Riparian Property to the Waters' Edge Is Inherently Inconsistent With The Public Trust Jurisprudence of This Court and Is Contrary to Michigan Law

A. The Nature and Origins of the Public Trust Doctrine

The weight and lineage of the public trust doctrine cannot be overestimated. The genesis of the public trust doctrine is found in Roman jurisprudence. The doctrine derives from the tenet that "by the law of nature, the air, running water, the sea, and consequently the shores of the sea" are common to mankind. Matthews v Bay Head Improvement Association, 95 NJ 306; 471 A2d 355 (NJ 1984), quoting, Justinian, Institutes (T. Sanders trans. 1st Am. Ed. 1876). Private ownership of the air, the seas, and its shores was fundamentally abhorrent to this "law of nature." No one was forbidden access to the sea, and everyone could use the seashore "to dry his nets there and haul them from the sea..." Id. The seashore was not private property, but "subject to the same law as the sea itself, and the sand or ground beneath it. Id. Under the Justinian construction of the public trust, the seashore extended to the limit of the highest winter flood. Id. n. 3.

In England, William the Conqueror and his successors violated this natural law of common entitlement to the seas and its shores by appropriating, granting, and fencing in such lands against common use. Arnold v Mundy, 6 NJL 1, 73 (1821). Eventually, with the adoption of Magna Charta, "which is said to be nothing more than a restoration of the ancient common law," the crown was forbidden from alienating public trust lands. "[W]here the banks of rivers had first been defended in his time, (that is when they had first been fenced in, and shut against the common use, in his time) they should be from thenceforth laid open." Id. Thus, with Magna Charta, the public trust doctrine became

embedded in the common law of England and the doctrine clearly included the "banks" of public trust waters.

"Not surprisingly, American law adopted as its own much of the English law respecting navigable waters, including the principle that submerged lands are held for a public purpose." Idaho v Coeur D'Alene Tribe of Idaho, 521 US 261, 284; 138 L Ed 2d; 117 S Ct 2028 (1997). In adopting the public trust doctrine the Supreme Court summarized the law as follows:

> In England, from the time of Lord Hale, it has been treated as settled that title in the soil of the sea, or of arms of the sea, below ordinary high water mark, is in the King...and that this title, *jus privatum*, whether in the King or in a subject, is held subject to the public right, *jus publicum*, of navigation and fishing.

Id., quoting, Shively v. Bowlby, 152 US 1, 13, 38 L Ed 331, 14 S Ct 548 (1894).

Application of the public trust doctrine was extended the Great Lakes in 1892:

> These lakes possess all the general characteristics of open seas, except in the freshness of their waters, and in the absence of the ebb and flow of the tide. In other respects they are inland seas, and there is no reason or principle for the assertion of dominion and sovereignty over and ownership by the State of lands covered by tide waters that is not equally applicable to its ownership of and dominion and sovereignty over lands covered by the fresh waters of these lakes.

Illinois Central Railroad Co. v Illinois, 146 US 387,435, 36 L Ed 1018, 13 S Ct 110 (1892). The Court summarized its holding as follows:

> The doctrine is founded upon the necessity of preserving to the public the use of navigable waters from private interruption and encroachment, -- a reason as applicable to navigable fresh waters as to waters moved by the tide. We hold, therefore, that the same doctrine as to the dominion and sovereignty over and ownership of lands under the navigable waters of the Great Lakes applies which obtains at the common law as to the dominion and sovereignty over and ownership of lands under tide waters on the borders of the

> sea, and that the lands are held by the same right in the one case as in the other, and subject to the same trusts and limitations.

Id. at 436.

The public trust doctrine was adopted and applied in Michigan as early as 1843. La Plaisance Bay Harbor Co, Walker, Ch. 155 (1843). In applying the doctrine, this Court intimated that both the bed and the "banks" of water bodies are subject to the public trust:

> The complainants do not own either the bed, or the banks, of the river, below the point of obstruction. The bed of the stream is public property, and belongs to the state. This is the case with all meandered streams, no part of them being included in the original survey; and the common law doctrine of *usque ad filum aquoe* is not applicable to them. The public owns the bed of this class of rivers, and is not limited in its right to an easement, or the right of way only.

Id. at 168. Later, this Court unequivocally adopted the public trust doctrine as stated in Illinois Central Railroad Co., *supra*. "It seems to me the reasoning of this case is without flaw, and that the law enunciated therein ought to stand as the law of this State." People v Silberwood, 110 Mich 103, 108; 67 NW 1087 (1896). Thus, Michigan adopted the public trust doctrine in its original common law formulation:

> The trust is a common law one; it prevailed in England long before the American Revolution; it was in the Virginia cession of the territory northwest of the River Ohio; it continued during the period the United States held the Northwest Territory and passed as the same trust to the State of Michigan at her admission to the Union; it has not changed in character or purpose and is an inalienable obligation of sovereignty.

Nedtweg v Wallace, 237 Mich 14, 17; 208 NW 51 (1925). Under the original common law formulation of the doctrine, trust lands extend to the "high tide" or "high-water mark" of the shore.

In summary, the public trust doctrine has its roots in the "laws of nature." At its core is the inviolable right of humans to enjoy, partake, and subsist on the earth's natural resources. The seas and their shores, including the Great Lakes, are arguably the most fundamental of these natural resources reserved to the public. Historically, not even kings could appropriate the great bodies of water and their shores for private gain and control. It cannot be disputed that the public trust doctrine is firmly ensconced in the common law of Michigan and that the doctrine is infused with the same weighty considerations that have always attended the application and defense of this ancient doctrine.

B. The Public Trust Doctrine Retains Its Full Common Law Scope In Michigan

It has long been established that the individual States have the authority to define the limits of the land held in public trust and to recognize private rights in such lands as they see fit. Phillips Petroleum Co. v. Mississippi, 484 US 469, 475; 108 S Ct 791; 98 L Ed 2d 877 (1988). As noted above, Michigan adopted the public trust doctrine in its common law formulation as early as 1843. La Plaisance Bay Harbor Co, Walker, Ch. 155 (1843). Subsequent cases applying the public trust doctrine have not expressly defined the limits of the public trust in Michigan, nor have they expressly limited the scope and application of the public trust doctrine. Nevertheless, certain clear rules can be gleaned from those cases resolving conflicts between private owners seeking to establish title to properties adjacent to public trust lands.

The first of these cases clearly demonstrates that the public trust is not limited to lands that are actually submerged, and that public trust uses extend beyond mere navigation of the waters. People v Warner, 116 Mich 228; 74 NW 705 (1898). In

Warner, the Court analyzed competing ownership claims arising from a statute enacted in 1891 which purported to reserve a segment of land in Saginaw Bay as a public hunting and shooting grounds. The land in question had lain between privately owned island and two marshy islands belonging to the State. The private owner occupied the land and opposed the State's designation of the land for hunting and shooting grounds.

This Court ultimately determined that the ownership of the land was a question for the jury. However, in the course of the opinion, the Court set forth several rules relevant to the ownership and use of public trust lands:

> The right of navigation is not the only interest that the public, as contradistinguished from the State, has in these waters. It has also the right to pursue and take fish and wild fowl, which abound in such places; and the act cited has attempted to extend this right over the lands belonging to the State adjoining that portion of the water known to be adapted to their sustenance and increase. Upon the subject of accretions, we understand the law to be that additions to the land of the littoral proprietor by the action of the water, which are so gradual as to be imperceptible, become a part of the land, and belong to the owner of the land, but, when not so, they belong to the State. So, if by the imperceptible accumulation of soil upon the shore of an island belonging to a grantee of the government, or by reliction, it should be enlarged, such person, and not the State, would be the owner; but, if an island should first arise out of the water, and afterwards become connected to that of the private proprietor, it would not thereby become the property of such person, but would belong to the State. People v Warner, 116 Mich 228, 239; 74 NW 705 (1898).

Thus, the Warner Court made it clear that: (1) public trust activities undoubtedly extend beyond mere navigation of the water; (2) previously submerged dry lands can indeed be subject to the public trust; and (3) under the concept of "imperceptible accumulation," additional land accrues to a riparian owner only when the land becomes permanently dry and the action of water on the land is no longer evident. With respect to the rights of the private owner to access navigable water over public trust lands, the Court concluded that: "it is merely a right to use the intervening land for [that] purpose, which does not

interfere with the rights of the public, and does not support a right to take full possession, and exclude both the State and the public from a large area of land and water, under a claim of title in fee." Id. at 240.

Additional support for the public trust principles announced in Warner, *supra*, is found in another case concerning the use of lands for hunting and gaming. State v Lake St. Clair Fishing and Shooting Club, 127 Mich 580; 87 NW 117 (1901). In Lake St. Clair Fishing and Shooting Club, the ownership of a strip of land south of Harsen's Island in the St. Clair River was at issue. In his concurrence, Justice Hooker reiterated that the public trust is not limited to water navigation. On the contrary, public trust uses extend to "fishing, boating, hunting, and in cutting ice by any member of the public, if the State owns title to the bed." Id. at 587. In a similar vein, Justice Hooker also concluded that:

> We must take judicial notice that the Great Lakes are navigable waters, and while, as in all cases of water, there must be a line where the water meets the shore and consequently the shallows, the legal characteristics of navigable water attach to all of it. It is a well-settled rule that the privileges of the public are not limited to the channel, or to those parts which are most frequently used, but extend to the high-water mark in all tide waters.

Id. at 587-586 (emphasis added). Thus, in St. Clair Hunting & Shooting Club, the expansive public trust principles announced in Warner remained in tact.

Subsequently, in a case involving the same tract of land, this Court definitively held that "previously submerged lands" can be subject to the public trust. State v Venice of America Land Co., 160 Mich 680; 125 NW 770 (1910). In Venice, the State claimed title to "lands" south of Harsen's Island which it reserved for public use as a hunting and fishing resort patrolled by the game warden of the State. Id. at 682. The land consisted of 3,000 or 4,000 acres about half of which was land and the other half water. Id. at 685.

The defendant in that case claimed title to the land in question through an alleged chain of title dating back to a British grant. The Court found for the State because the lands were once a part of the bed of Lake St. Clair. Id. at 701. The Court concluded:

> The depth of the water upon submerged land is not important in determining ownership. The condition of this territory when the State was admitted into the Union is the condition which must control. That the State of Michigan holds these lands in trust for the use and benefit of its people – if we are correct in our conclusion – cannot be doubted. The State holds its title in trust for the people, for the purposes of hunting, fishing, etc. It holds the title in its sovereign capacity. Id. at 702.

It is therefore beyond dispute that the public trust is not limited to navigation of waters, but rather extends to "lands" incident to the use of navigable waters up to the high water mark.

The concept that previously submerged, or "relicted," land can be subject to the public trust was reaffirmed in Nedtweg v Wallace, 237 Mich 14; 208 NW 51 (1927). In Nedtweg, this Court assessed the scope of the Legislature's power, if any, to compromise the public trust lands of the Great Lakes through grants of private leases. The public trust lands at issue consisted of "several thousand acres of the bed of Lake St. Clair suitable for cottages and summer homes." Id. at 15. The Court started from the premise that relicted lands may be subject to the public trust:

> So far as the issue here is concerned, we entertain the opinion that "lake bottom lands" means lands not wholly subaqueous, but relicted lands and actually surveyed as such by the State in accordance with the provisions of the act. Id. at 18.

At issue in Nedtweg was an act passed by the Legislature that allowed the State to lease these relicted public trust lands of the "bed" of Lake St. Clair. The Legislature, acknowledging public trust precedent, expressly provided that the lands could not be "sold" and that at all times they would remain subject to public trust uses. This latter

provision saved the statute. Over the dissent of Justice McDonald, who opined that public trust lands are completely inalienable, the Court upheld the validity of the statute because the relicted lands in question remained subject to the public trust:

> The rights of the public, of which the State, in its sovereign governmental capacity, acts as trustee, have been sedulously protected; not in prohibiting grants by the State of private rights to relicted lake beds or the rule of riparian ownership, for such would restrict the proprietary sovereignty, but in denying the power, by grant or otherwise, to abdicate the trust by placing use and control in private hands to the curtailment or exclusion of public use.

Nedtweg, 237 Mich at 21 (emphasis added).

Although they do not establish a definitive dividing line between public trust and private lands, the foregoing cases decisively sustain certain hallmarks of the public trust doctrine as it applies in Michigan. Among these are the definitive precepts that: (1) the public trust doctrine exists in Michigan as a creature of common law; (2) public trust uses are not limited to navigation of the waters to which the doctrine applies, but rather public trust uses encompasses all access rights incident to hunting, fishing, fowling, ice cutting, etc.; (3) that the trust extends above the water line to a "high water" mark that has not yet been expressly defined by Michigan common law; and finally, (4) above all, the public trust is inalienable and must be "sedulously" protected.

C. The Court of Appeals Erred By Relying On Dicta To Conclude That This Court's Decision in Hilt v. Weber Compromised the Scope of the Public Trust Doctrine In Michigan.

In its decision below, the Court of Appeals relied almost exclusively on the case of Hilt v Weber, 252 Mich 198; 233 NW 159 (1930), to rationalize its new judicial rule alienating public trust lands to private ownership and relegating public use to navigation

of the water itself. Although the public trust doctrine was addressed extensively in Hilt, this Court did not reduce or alter the scope of the public trust doctrine in the course of deciding Hilt. Indeed, the Court of Appeals expressly acknowledged that it relied on dicta in the Hilt decision to reach its radical conclusion that riparian owners possess exclusive use of the shore to the water's edge. In so doing, the Court of Appeals committed reversible error.

In Hilt, the court was concerned with the legal effect, if any, of the so-called "meander line[1]" on the title of riparian landowners. The issue was pertinent because in the previous cases of Kavanaugh v Rabior, (222 Mich 68; 192 NW 623 (1923)) and Kavanaugh v Baird (241 Mich 240; 217 NW 2 (1928)), the Court had departed from precedent and declared meander lines to be the static legal boundary between private riparian ownership and public trust lands. The rule from the Kavanaugh cases had the result of cutting off the riparian owner's fee title at the meander line. It also had the effect of relegating potentially vast swatches of dry land to the public trust through accretion, reliction and other shoreline changes over extended periods of time. In essence the Kavanaugh cases declared private ownership and the public trust to be mutually exclusive and had the effect of destroying the most essential element of riparian title – i.e. the characteristic of property directly abutting a body of water. Hilt, 252 Mich at 218. Similarly, the Kavanaugh rule abolished the long-standing rule of riparian ownership that, once permanently dry, relicted land accrues to the title of the riparian owner. Id.

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[1] "Meander lines" are survey lines marked by government surveyors as a means of "approximating" the shore for purposes of determining acreage, making plats, and establishing the price of riparian land when originally conveyed to private owners. Meander lines were run as merely general, not accurate, representations of the shore.

After conducting an extensive analysis of the public trust doctrine, the Hilt Court reversed the Kavanaugh cases and restored the former common law formulation of the public trust doctrine as an encumbrance on the riparian owner's title along the shore, rather than as an interposing and mutually exclusive fee title held by the State. Id. at 227. The Hilt Court also restored the pre-Kavanaugh rule that land that gradually and imperceptibly becomes permanently dry accrues to the riparian owner. Id. at 221, quoting, People v Warner, *supra*. This latter rule was summarized in the Court's statement that "the title of the riparian owner follows the shoreline under what has been graphically called a 'moveable freehold.'" Id. at 219.

In the course of its opinion, the Hilt Court cited several authorities that variously placed the limits of the public trust at the high-water mark, the low-water mark and the "shoreline." However, the Court did not rule on this point because it was neither necessary nor germane to the issue at hand. The fact that this issue remained undecided is reflected in Justice Potter's concurring opinion which efficiently summarizes the majority's holding:

> Whether the title to the lands between the water's edge at high-water mark and the low-water mark is in the riparian proprietor or in the State for the use and benefit of the public, including the riparian proprietor, is not important. If the title is in the State, it holds it as a mere naked trustee subject to...all other rights of the riparian proprietor. The State has no power to divest itself of this trust.

Hilt, 252 Mich at 228. Justice Potter's comment concisely states the confluence of the public trust and riparian ownership. The two interests are not mutually exclusive.

Justice Potter's concurring opinion also makes it clear that at the very least, lands that remain subject to even gradual influence of the water remain within the public trust:

> The Great Lakes are fresh water, not salt water; above sea level, not at sea level; subject to drainage, not fixed and permanent, and subject to variation in level due to seasonal causes, evaporation and precipitation. The law of the sea governs the Great Lakes only so far as applicable. The doctrine of reliction has no application to lands temporarily laid bare by a recession of the water due to variation in the amount of evaporation and precipitation, nor to lands laid bare by a recession of the water due to diversion or drainage.

Hilt, 252 Mich at 228.

In summary, Hilt simply abolished the Kavanaugh rule that the "meander line" served as a permanently fixed dividing line between riparian property and public trust property and restored the public trust doctrine to the common law formulations previously recognized by this Court. Factually, Hilt concerned the scope of a riparian owners "title" for purposes of assessing damages for sale and foreclosure. Nowhere in the opinion does the Court purport to limit public trust access and usage. These public rights co-exist with the title and access rights of the riparian owner along the water's edge.

Nevertheless, in its decision below, the Court of Appeals relied on Hilt as the primary, if not sole, legal authority for its conclusion that riparian owners definitively possess the right of "exclusive use and enjoyment of their land to the waters' edge" and the concomitant right to exclude the public from traversing beyond the water itself. Glass v Goeckel, 262 Mich App 29, 43-44; 683 NW2d 719 (2004). Tellingly, after announcing its holding, the Court of Appeals graciously confessed that this extraordinary new rule of law is drawn from *dicta* in the Hilt decision. For this reason, among others, the decision below is erroneous and must be reversed.

This Court recognizes a distinction between implicit "judicial acts" which can serve as binding precedent in some instances, and mere *obiter dictum* which must be

disregarded as lacking in precedential value. Detroit v Public Utilities Comm., 288 Mich 267 (1939). In Public Utilities Commission, the rule was explained as follows:

> When a court of last resort intentionally takes up, discusses and decides a question germane to, though not necessarily decisive of, the controversy, such decision is not a *dictum* but is a judicial act of the court which it will thereafter recognize as a binding decision...[W]here a question of general interest is supposed to be involved and is fully discussed and submitted by counsel, the court frequently decides the question with a view to settle the law, and it has never been supposed that a decision made under such circumstances could be deprived of its authority by showing that it was not called for by the record...

Id. at 299-300 (citations omitted). The Glass panel unsuccessfully attempts to shoehorn dicta from Hilt into this rule.

In formulating its new "exclusive use" rule, the Glass panel excised a phrase from a section of the Hilt decision that consisted of a string of citations demonstrating conflicting interpretations of riparian rights in various jurisdictions. Specifically, the Court quoted the Hilt Court's recognition that in a Wisconsin case "it has been held that the public has no right of passage over dry land between low and high-water mark but the exclusive use is in the riparian owner..." Glass, 262 Mich App at 40. The ellipsis employed by the Glass panel omits the final portion of the quoted sentence which went on to conclude that title to lands between low and high water mark remains with the State. Hilt, 252 Mich at 226.

After acknowledging that the foregoing language is dicta because Hilt did not concern the issue of public access rights, the Glass panel nevertheless declared that the "principle [of exclusive access in the riparian owner] was endorsed by the Hilt Court, and it is consistent with and germane to the actual holding in Hilt, i.e., that the riparian owner has exclusive use to the land running to the waters' edge." Glass, 262 Mich App at 40, n.

7. The inaccuracy and circular logic of this statement is obvious. As the Glass panel confesses, the dispute in Hilt did not even remotely concern the question of public access. Therefore the Hilt Court most certainly did not issue an "actual holding" on the point. Again, public access was neither germane nor necessary to the Court's decision in Hilt. Therefore, the Hilt Court did not, and could not, make any binding pronouncements regarding "exclusive use" by the riparian owner. As a result, the quoted language employed by the Glass panel was pure dicta and does not lend legal support to the panel's radical new rule of law granting Great Lakes riparian owners "exclusive use" to the waters' edge.

Overall, the decision in the Court of Appeals below is logically and substantively erroneous. In addition to the Glass panel's inappropriate reliance on dicta to establish a new rule of law, the decision itself is contrary to the public trust jurisprudence of this State and it directly contradicts many of the most fundamental principles adopted in the decisions of this Court both before and after Hilt v Weber. The substantive error of the decision is reflected by the panel's contradictory conclusion that although riparian owners possess exclusive use of land to the waters' edge, "because it once again may become submerged, title remains with the state pursuant to the public trust doctrine." Glass, 262 Mich App at 40. As explained above, a bedrock principle of the public trust doctrine is that the trust is inalienable and that the State cannot "abdicate the trust by placing use and control in private hands to the curtailment or exclusion of public use." Nedtweg v Wallace, 237 Mich 14, 21; 208 NW 51 (1927). Because the public trust is cannot be alienated, the Court's opinion is untenable. Public trust lands cannot be abdicated to exclusive private use. The Glass panel's decision directly contradicts this

fundamental principle and points out the Court's failure to comprehend the proper scope and application of the doctrine under Michigan common law.

Similarly, the Glass panel erroneously concludes that public trust uses are limited to "the public's right to the free and unobstructed use of navigable *waters* for navigation purposes." 262 Mich App at 41. Again, this assertion is in direct conflict with this Court's prior decisions. People v Warner, 116 Mich 228, 239; 74 NW 705 (1898). In Warner, this Court expressly stated that "the right of navigation is not the only interest that the public, as contradistinguished from the State, has in these waters." Id. (emphasis added) Moreover, it is beyond dispute that the public trust has been applied by this Court to "lands" adjacent to water. "[T]he shores of navigable waters, and the soil under them, belong to the State in which they are situated as sovereign." Nedtweg v Wallace, 237 Mich 14, 21; 208 NW 51 (1926) (emphasis added). The Court of Appeals' decision to the contrary must give way to this Court's decisions.

It is beyond dispute that this Court's decisions have extended public trust uses to activities such as fishing, hunting, fowling, ice cutting, etc. on public trust "lands" and not just navigation of the waters. State v Venice of America Land Co., 160 Mich 680; 125 NW 770 (1910). In light of the variety of public trust uses recognized by this Court, the Court of Appeals' holding that public trust use is limited exclusively to use and navigation of the water is patently erroneous. The various public trust activities acknowledged by this Court are extensive and an activity as innocuous as pedestrian travel surely falls within the scope of activities allowed under the public trust. Because it is erroneously based on dicta, and because it is contrary to many of the most fundamental principles of public trust jurisprudence, the Glass panel's decision must be reversed.

D. Since Its Decision in Hilt, This Court Has Acknowledged That The Public Trust Doctrine Extends to the High Water Mark and Overlaps Private Riparian Ownership

By treating private riparian ownership and the public trust as mutually exclusive rights, the Glass panel's decision misapprehends the overlapping nature of the public trust. In a fairly recent decision this Court clearly recognized that the public trust extends to the high water mark and encumbers the riparian owner's title to that point. Peterman v Department of Natural Resources, 446 Mich 177; 521 NW2d 499 (1994).

In Peterman, an eminent domain case, the Plaintiffs sued the state for just compensation after the Michigan Department of Natural Resources built a boat launch access ramp adjacent to Plaintiffs' waterfront property on Grand Traverse Bay. 446 Mich at 181. The access ramp resulted in the washing away of Plaintiff's sandy beach and some of the permanent "fast lands" above the beach. Id. In assessing the Plaintiffs' entitlement to just compensation, the Court found it necessary to analyze Plaintiffs' lost "fast-lands" independently of the sandy beach below the high water mark. Because the latter portion of the Plaintiffs' property was burdened by the public trust doctrine, it was either of lesser value or not subject to just compensation at all for eminent domain purposes. Thus, for purposes of determining whether Plaintiffs were entitled to just compensation, the Court expressly segregated Plaintiffs' "fast lands" from the "sandy beach" portion of their property.

In distinguishing the respective portions of the Plaintiffs' property in Peterman, this Court reaffirmed the common law principle that "Michigan law has long held that 'the limit of the public's right is the ordinary high water mark of the river. This means that the ownership of fast land [above the high water mark] is unqualified and not

burdened with a public right.'" 446 Mich at 198. In contrast, riparian lands below the high-water mark are burdened with public rights. The Court then refers the reader to the definition of "ordinary high water mark" found in the Inland Lakes and Streams Act. The relevant section defines the "ordinary high water mark" as:

> The line between upland and bottomland that persists through successive changes in water levels, below which the presence and action of the water is so common or recurrent that the character of the land is marked distinctly from the upland and is apparent in the soil itself, the configuration of the soil , and the vegetation. MCL 281.952(h) (Now MCL 324.30101(h)). Id.

Although, for statutory purposes, this definition only applies to "inland" lakes and streams, this Court impliedly adopted the definition for common law application of the public trust doctrine to the Lake Michigan property in question. Peterman, 446 Mich at 198, n. 29. The Court's intent to adopt this definition of the "ordinary high water mark" as the limit of public trust lands is reflected in its explanation as to why so-called fast lands above the high water mark are subject to just compensation:

> This is so because '[t]here must also be horizontal limits to the 'bed' of [a waterway]; otherwise, the navigational servitude would extend infinitely in all directions and swallow up any claim for 'just compensation'...

Id.

Ultimately, the Court easily concluded that Plaintiffs were entitled to compensation for their loss of "fast lands" because such lands were above the high water mark and therefore not subject to the public trust. Id. at 198. However, the Court employed a separate analysis to the "sandy beach" portion of Plaintiff's property which was subject to the public trust. The Court noted that Plaintiffs' [riparian] rights "must give way to any use of the tide lands and water flowing over them that serve the public right of navigation." Id. at 197 (emphasis added). Again, the Court characterized the

Plaintiffs' sandy beach as tide lands "below the ordinary high water mark" and concluded that they therefore fell under the public trust. The Court also concluded that "as a general rule, only lost fast lands must be compensated" for eminent domain purposes. Ultimately, Plaintiffs were found to be entitled to compensation for the sandy beach on an independent legal basis. Specifically, compensation was allowed for the sandy beach portion because the Plaintiffs shared in the public trust rights applicable to that portion of the property and because the DNR was negligent and reckless in its construction of the boat launch ramp that led to the destruction of Plaintiffs' beach and fast lands. As a result, the action of the State was not a "necessary" taking for eminent domain purposes. Id. at 202.

Although Peterman is not technically a public access case, it clearly undermines the Court of Appeals' holding in Glass that the public trust ceases at the actual water line. In Peterman, this Court squarely acknowledged that the title to Great Lakes riparian land is subordinate to, and burdened by, the public trust. 446 Mich at 195. Peterman also expressly acknowledges that the public trust extends beyond the actual waters' edge to the ordinary high water mark. 446 Mich at 198.

In its decision below, the Court of Appeals properly understood that with respect to lands that "once again may become submerged, title remains with the state pursuant the public trust doctrine." Glass, *supra*, 262 Mich App at 40. However, the court erred in its conclusion that the private owner nevertheless has exclusive possession of these admittedly "public trust" lands. Because the decision of the Court of Appeals below allows private ownership to trump the public trust, and because it otherwise cannot be

reconciled with the public trust principles acknowledged by this Court in Peterman, Hilt and its predecessors, the decision must be reversed.

E. This Court Should Formally Adopt The Common Law Definition of "Ordinary High Water Mark" Referenced In Its Decision in Peterman v Department of Natural Resources and Acknowledge the Right of Pedestrian Travel Along Public Trust Lands Below The Ordinary High Water Mark

In its decisions concerning the public trust doctrine, this Court has both expressly and impliedly acknowledged that the public trust extends upland above the waters' edge and encompasses lands to a limited extent. People v Warner, 116 Mich 228; 74 NW 705 (1898). But a precise definitive delineation of public trust limits has remained vague. As the Court has acknowledged, there must be "horizontal limits" to the public trust, otherwise it would extend infinitely in all directions. Peterman v Department of Natural Resources, 446 Mich 177, 199; 521 NW2d 499 (1994). In Peterman, this Court reaffirmed the long-standing rule that the public trust extends to the ordinary high water mark. Id. at 198. However, the Court only impliedly adopted the definition of "ordinary high water mark" found in the Inland Lakes and Streams Act. Id. Again, the Inland Lakes and Streams Act defines the ordinary high water mark as:

> The line between upland and bottomland that persists through successive changes in water levels, below which the presence and action of the water is so common or recurrent that the character of the land is marked distinctly from the upland and is apparent in the soil itself, the configuration of the soil , and the vegetation.

MCL 324.30101(h).

By contrast, in the absence of precedential guidance, the trial court in this matter adopted the definition of high water mark found in the Great Lakes Submerged Lands Act, which places the ordinary high water mark for the individual Great Lakes at specific

elevations above sea level. See, MCL 324.32502. As amicus curiae, the Michigan Land Use Institute, respectfully suggests that the definition of ordinary high water mark adopted by the trial court is too expansive and unworkable. In contrast, the definition impliedly adopted by this Court in Peterman, *supra*, is more practical and well-suited for purposes of defining and administering public trust lands adjacent to the non-tidal waters of the Great Lakes. The Peterman definition narrowly and reasonably defines the limits of the public trust in a manner that is not unduly burdensome of private riparian rights. Moreover, it neatly coincides with the rule of reliction announce in Warner and Hilt, *supra*, that lands which become permanently dry through imperceptible accumulation accrue to the riparian owner.

The public trust doctrine is a creature of common law. Nedtweg v Wallace, 237 Mich 14, 17; 208 NW 51 (1925). Amicus curiae, the Michigan Land Use Institute, respectfully suggest that for purposes of common law application of the public trust in Michigan, this Court formally adopt the definition of "ordinary high water mark" set forth in the Inland Lakes and Streams Act, MCL 324.30101, as this definition was only impliedly adopted by this Court in Peterman, *supra*.

Finally, this Court has never expressly determined whether pedestrian travel or "beach walking" is encompassed within the public trust. However, support for the right to pedestrian travel on public trust lands can be easily gleaned from the decisions of this Court. In a number of these decisions this Court has expressly acknowledged public trust uses more expansive and intrusive than mere pedestrian travel. The most common example can be found in the decisions affirming the right of the public to hunt on public trust lands. State v Lake St. Clair Fishing and Shooting Club, 127 Mich 580; 87 NW 117

(1901). Indeed, the record below indicates that both parties to this action acknowledge that beach walking along the waters' edge across private riparian property is an accepted and long-standing practice in which they have both engaged. Additional support can be found in cases from other jurisdictions which have expressly acknowledged pedestrian travel as one of the public trust rights. See e.g., Matthews v Bay Head Improvement Association, 95 NJ 306; 471 A2d 355 (NJ 1984).

Again, although the right to pedestrian travel on public trust lands has been impliedly acknowledged by this Court, and though the right exists in practice, the Court has never expressly ruled on the issue. The recognition of the right of pedestrian travel on public trust lands would not be novel or unduly burdensome to Great Lakes riparian owners. An easement, be it pedestrian or otherwise, along the water's edge does not cut off or interfere with a riparian owner's rights. Thies v Howland, 424 Mich 282, 380 NW2d 463, n. 5 (1986) citing, Croucher v Wooster, 271 Mich 337; 260 NW 739 (1935). Amicus, the Michigan Land Use Institute respectfully requests that the Court take this opportunity to expressly acknowledge the practice of beach walking as a common law public trust right.

CONCLUSION AND RELIEF REQUESTED

As explained above, the decision of the Court of Appeals in this matter is erroneous for various reasons. It is impermissibly derived from dicta and it is otherwise inconsistent with the public trust jurisprudence of this Court. In addition, as a matter of public policy the decision is disturbing and is likely to produce unfortunate results if allowed to stand. The new rule of exclusive private possession to the waters' edge announced by the Court of Appeals is unnecessarily antagonistic and logically

impractical. The decision effectively holds that the public trust allows pedestrians to walk along the edges of Great Lakes abutting private property so long as their feet remain submerged. Should a wave recede and expose the feet of the unlucky pedestrian, the individual would automatically be subject to liability for trespass. The rule is too rigid and will promote petty enforcement measures. It will also encourage private riparian owners to usurp, segregate and isolate the shores of the Great Lakes through fencing and other measures that will necessarily infringe on the public trust and destroy the natural beauty of our shores.

For the foregoing reasons, amicus curiae, the Michigan Land Use Institute, respectfully requests that this honorable Court reverse the decision of the Court of Appeals and issue an opinion restoring the original scope of the public trust. Amicus also requests that the Court clarify the limits of the public trust by adopting the definition of "ordinary high water mark" found in the Inland Lakes and Streams Act, MCL 324.30101(h), as the common law definition delimiting public trust lands and, finally, that the Court expressly hold that pedestrian travel is a common law public trust right.

Respectfully submitted,

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